No. 90-1271

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In The Supreme Court of the United States October Term, 1990

NORFOLK AND WESTERN RAILWAY COMPANY
Petitioner,

v.

OLEN ROBERSON, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Date: February 8, 1991

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QUESTION PRESENTED

Did Congress intend that a railroad brakeman, engaged in the interstate transportation of coal, can qualify as a "miner" within the meaning of Section 402(d) of the Black Lung Benefits Act, as amended, 30 U.S.C. 902(d) (1988), and thereby qualify for benefits under that Act?

LIST OF PARTIES AND RULE 29.1 LIST

The names of the parties to the proceeding are contained in the caption.

The common stock of petitioner Norfolk and Western Railway Company is wholly owned by Norfolk Southern Railway Company, and the common stock of Norfolk Southern Railway Company is wholly owned by Norfolk Southern Corporation. The other subsidiaries of petitioner and of its parent companies are:

I. Norfolk and Western Railway Company subsidiaries, other than wholly owned subsidiaries:

Wabash Railroad Company

II. Norfolk Southern Railway Company subsidiaries, other than wholly owned subsidiaries:

Highpoint, Randleman, Asheboro and Southern Railroad Company
Mobile and Birmingham Railroad Company
North Carolina Midland Railroad Company
South Western Rail Road Company
State University Railroad Company
Yadkin Railroad Company

III. Norfolk Southern Corporation subsidiaries, other than wholly owned subsidiaries:

Norfolk and Portsmouth Belt Line Railroad Company

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES AND RULE 29.1 LIST ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

I. The Court Of Appeals' Ruling That Congress Intended To Include Railroad Workers Within The Definition Of "Miner" In The Black Lung Benefits Act Is Inconsistent With The Act's Purpose And Contrary To Its Legislative History 7

II. The Federal Courts Have Issued Conflicting Interpretations Of The Coverage Of Railroad Workers Under The BLBA 14

CONCLUSION 18

Appendices:

Opinion of the Court of Appeals in *Norfolk & Western Railway Company v. Olen Roberson and Director, Office of Workers' Compensation Programs, United States Department of Labor*, 918 F.2d 1144 (4th Cir. 1990) 1a

Opinion of the United States District Court for the Western District of Kentucky in *Louisville and Nashville Railroad Company v. Donovan*, No. 80-0611-L(G) (W.D. Ky. 1981) 11a

Decision of the Benefits Review Board in *Olen R. Roberson v. Norfolk & Western Railway Company, BRB No. 87-235 BLA* 17a

TABLE OF AUTHORITIES

CASES *Page*

Atchison T. & S.F. Railway v. Preston, 257 F.2d 933 (10th Cir. 1958) 9

Bay v. Merrill & Ring Logging Co., 243 U.S. 40 (1917) 9

Boston & Maine Railroad v. Armburg, 285 U.S. 234 (1932) 9

Browder v. Tipton, 630 F.2d 1149 (6th Cir. 1980) 12

Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 7

Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548 (1976) 12

Fox v. Director, OWCP, 889 F.2d 1037 (11th Cir. 1989) 16

Lewis v. United States, 445 U.S. 55 (1980) 12

Louisville & N. R.R. v. Donovan, No. 80-0611-L(G), *rev'd. on other grounds*, 713 F.2d 1243 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984) 5, 15

Louisville & N. R.R. v. Donovan, 713 F.2d 1243 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984) 15, 16

McCluskey v. Marysville & N. Ry., 243 U.S. 36 (1917) 9

Mills v. United States, 713 F.2d 1249 (7th Cir. 1983) 12

New York Cent. R.R. v. Windfield, 244 U.S. 147 (1917) 9

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 13

Roberts v. Weinberger, 527 F.2d 600 (4th Cir. 1975) 13

Simpson v. United States, 435 U.S. 6 (1978) 12

South Buffalo Ry. v. Ahern, 344 U.S. 367 (1953) 9

Page

Stroh v. Director, OWCP, 810 F.2d 61 (3d Cir. 1987) 16

United States v. American Trucking Assoc., 310 U.S. 534 (1940) 13

Urie v. Thompson, 337 U.S. 163 (1949) 9

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 2

STATUTES AND RULES

Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901-45 (1988) ..... *passim*

Section 401(a), 30 U.S.C. § 901(a) 7, 8

Section 402(d), 30 U.S.C. § 902(d) ..... *passim*

Section 422(a), 30 U.S.C. § 932(a) 4

Section 422(b), 30 U.S.C. § 932(b) 4

Black Lung Benefits Reform Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 8

Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 ..... *passim*

Section 2(b), 92 Stat. 95 2

20 C.F.R. § 725.202(a) (1990) 5

20 C.F.R. § 725.491(a) (1990) 5

Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 7

Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1988) 3, 6, 9

45 U.S.C. § 51 9

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 921(b)(3) (1988) 4

33 U.S.C. § 921(c) 5

Page

Railroad Retirement Act, 45 U.S.C. §§ 231-31u (1988) 3, 6, 10

45 U.S.C. § 231(a)(2)(i) 10

45 U.S.C. § 231(b)(2) 10

Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351-67 (1988) 3, 6

45 U.S.C. § 351(d) 10

28 U.S.C. § 1254(1) (1988) 2

OTHER AUTHORITIES

Annotation, *Liability Under Federal Employers' Liability Act (45 U.S.C. §§ 51 et seq.) For Industrial or Occupational Disease or Poisoning*, 30 A.L.R. 3d 735 (1970 & Supp. 1989) 9

123 Cong. Rec. (1977) 12

H. Conf. Rep. No. 864, 95th Cong., 2d Sess. (1978), *reprinted* in 1978 U.S. Code Cong. & Admin. News 308 ..... 10, 13

House Comm. on Education and Labor, 96th Cong., *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977* (Comm. Print 1979) 8

H.R. Rep. No. 91-563, 91st Cong., 2d Sess. (1969), *reprinted in* 1969 U.S. Code Cong. & Admin. News 2503 8

H.R. Rep. No. 92-460, 92d Cong., 2d Sess. (1971) 8

H.R. Rep. No. 95-151, 95th Cong., 1st Sess. (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 237 8

S. Rep. No. 92-743, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News 2305 8

S. Rep. No. 95-209, 95th Cong., 1st Sess. (1977) 8, 11

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OLEN ROBERSON, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, NORFOLK AND WESTERN RAILWAY COMPANY ("NW"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on November 16, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 918 F.2d 1144 and is reprinted in the Appendix to this Petition ("App.") at 1a.

The September 29, 1989, decision of the United States Department of Labor Benefits Review Board, the administrative decision reviewed by the Court of Appeals, has not been reported and is reprinted in the Appendix at 17a.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on November 16, 1990. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988). This petition has been filed within the time period provided by Supreme Court Rule 13.1.

STATUTES INVOLVED

Black Lung Benefits Act ("BLBA"), Section 402(d), 30 U.S.C. § 902(d) (1988), as amended by Section 2(b) of the Black Lung Benefits Reform Act of 1977 ("1977 Amendments"), Pub. L. No. 95-239, 92 Stat. 95:

> The term "miner" means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.

STATEMENT OF THE CASE

I. Nature of the Case

In Section 2(b) of the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95, Congress amended the definition of the term "miner" in the Black Lung Benefits Act[1] to extend black lung benefits coverage to an individual "who works or has worked in . . . transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment." The issue presented in this case is whether Congress thereby intended to extend such coverage to employees of common carrier railroads who have been exposed to coal dust as a result of their participation in over-the-road movements of unprocessed coal away from mine sites, notwithstanding the fact that those employees are already

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[1] The basic statutory scheme of the Black Lung Benefits Act, as amended, 30 U.S.C §§ 901-45 (1988), is discussed in detail in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

fully protected against work-related illness and injury by a comprehensive scheme of federal legislation including the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1988), the Railroad Retirement Act, 45 U.S.C. §§ 231-31u (1988), and the Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351-67 (1988).

II. The Administrative Proceedings Below

Olen R. Roberson was employed by NW from 1947 until his retirement in 1979. Between 1956 and 1973 Roberson's work as a brakeman or conductor included work on NW trains that hauled unprocessed coal from various mines in Virginia to a coal preparation plant located several miles away from the mines. NW workers, including Roberson, would typically transport empty railroad cars from a railroad classification yard to designated tracks near the loading tipples at several mine sites where coal company employees would move and load the cars with raw coal. After distributing the empty cars to the various mine sites, Roberson would pick up and transport cars previously loaded and placed by coal company employees from the mine sites to designated tracks at the coal preparation plant several miles away. There the preparation plant employees would move the cars and dump the raw coal and, later, return the cars to the railroad filled with processed coal for delivery to consumers. Roberson also worked in transporting cars filled with processed coal to the ultimate consumer during this period. In performing these duties, Roberson was exposed to coal dust.

In all cases, Roberson's work was limited to the performance of traditional railroad brakeman/conductor duties such as checking and coupling air hoses on the cars, setting and releasing hand brakes, and operating switches. All train movements, including movements of unprocessed coal, were over trackage operated by NW as part of its interstate rail system. NW did not operate any coal mines during this period and does not operate any today. App. 3a-4a, 19a n.7.

Roberson filed a claim for disability benefits under the Black Lung Benefits Act, as amended, 30 U.S.C. § 901 *et seq.* (1988) (the "Act" or "BLBA"), on February 24, 1978. Following a hearing, an administrative law judge ruled that Roberson was a "miner" within the meaning of Section 402(d) of the Act, 30 U.S.C. § 902(d), and is entitled to benefits, and that NW was

an "operator" responsible for the payment of those benefits within the meaning of BLBA Section 422(b), 30 U.S.C. § 932(b). App. 18a.

NW appealed that decision to the Benefits Review Board ("Board") pursuant to 30 U.S.C. § 932(a), which incorporates the administrative review procedures of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 921(b)(3) (1988). In its September 29, 1989, decision, the Board affirmed the administrative law judge's determination that Roberson was a "miner." App. 22a. The Board reasoned that, because Roberson had been physically present at a mine where raw coal was being loaded and had engaged in its transportation to a coal preparation facility, he was a "miner" under the BLBA. App. 20a-22a.[2] The Board also upheld the determination that NW was an "operator" within the meaning of the Act and is responsible for the payment of disability benefits. Rather than interpreting the statutory definition of "operator", the Board relied on interpretive regulations of the Department of Labor that provided that "[i]t is Congress' intent that any employer of a miner as defined in 725.202(a) shall, to the extent appropriate, be considered an operator for purposes of this part and the provisions of this part shall be construed in accordance with this intent." 20 C.F.R.

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[2] The Board used a "three-prong test" in analyzing these facts:

> (1) the coal with which the miner worked was still in the course of being processed, and not yet a finished product in the stream of commerce (status of the coal test); (2) the miner performed a function integral to the extraction or preparation of coal, and not one merely ancillary to the delivery and commercial use of processed coal (function test); and (3) the miner's work occurred in or around a coal mine or coal preparation facility (situs test).

App. 20a.

§ 725.491(a) (1990).[3] App. 24a.

III. The Court of Appeals' Decision

NW sought review of the Board's decision by the Fourth Circuit under 33 U.S.C. § 921(c). The court, in a November 16, 1990, opinion, affirmed the Board's decision in its entirety. App. 1a. The court ruled that the "plain language" of BLBA Section 402(d) includes railroad workers within the definition of "miner" because of its reference to "transportation." App. 5a. Accordingly, the court ruled that it had no need to consider the Act's legislative history. App. 7a. The court rejected NW's contention that such an expansive interpretation of the BLBA was inconsistent with Congress' overriding purposes in enacting the Act and, in particular, Congress' express intent, manifest in the legislative history of the 1977 Amendments, to exclude the employees of common carrier railroads from coverage. App. 7a n.3.[4]

REASONS FOR GRANTING THE WRIT

This case presents a question of overriding importance to the railroad industry. The erroneous Court of Appeals' decision, if not corrected, will expose the nation's railroads to thousands of claims for black lung benefits with total liability in the tens of millions of dollars. There are 64 black lung claims currently pending against NW and its affiliated carriers alone and at least

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[3] The Department of Labor's regulations at 20 C.F.R. § 725.202 (a) (1990) provide in relevant part that:

> A "miner" for the purposes of this part is any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. A coal mine construction or transportation worker shall be considered a miner to the extent such individual is or was exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility. * * *

[4] The court also rejected NW's contention that it was not an "operator" within the meaning of the Act. While NW continues to assert that it was not an "operator" under the statutory definition, it has not included this issue as a question for the Court; a favorable ruling by the Court on the "miner" issue will result in NW not being deemed an "operator" even under the Department of Labor regulations. *See* 20 C.F.R. § 725.491 (a) (1990).

110 claims currently pending against other railroads throughout the industry. This highly controversial issue of the coverage of railroad employees has already resulted in conflicting federal court rulings and will be the subject of continuing litigation if not resolved by this Court. This Court should end the uncertainty in this area for railroads and claimants alike.

As shown below, the Court of Appeals' extension of BLBA coverage to railroad workers is manifestly inconsistent with Congress' limited purpose in passing the Act: the establishment of an adequate *federal* remedy for coal miners affected by pneumoconiosis because of the inadequacy of traditional *state* workers' compensation statutes. Interstate railroad workers, on the other hand, have for more than fifty years enjoyed comprehensive protection from the effects of work-related illness and injury under a comprehensive scheme of federal legislation: the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1988); the Railroad Retirement Act, 45 U.S.C. §§ 231-31u (1988); and the Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351-67 (1988).

Moreover, Congress unambiguously directed, at the time of the passage of the 1977 Amendments that added the word "transportation" in BLBA Section 402(d), that it did not intend thereby to include railroad workers within the Act's coverage. The Court of Appeals effectively ignored this determinative legislative history.

Finally, the Court of Appeals' decision conflicts with that of the only other federal court that has squarely addressed the inclusion of railroad workers within the definition of "miner" in the BLBA, *Louisville & N. R.R.* v. *Donovan,* No. 80-0611-L(G) (W.D. Ky. 1981), *rev'd on other grounds,* 713 F.2d 1243 (6th Cir. 1983), *cert. denied,* 466 U.S. 936 (1984).[5]

[5] The District Court decision in *Louisville & N. R.R.* is reprinted at App. 11a-16a.

I. The Court Of Appeals' Ruling That Congress Intended To Include Railroad Workers Within The Definition Of "Miner" In The Black Lung Benefits Act Is Inconsistent With The Act's Purpose And Contrary To Its Legislative History

The legislative history of BLBA Section 402(d) clearly demonstrates that Congress intended to exclude railroad workers from the coverage of the Act. In determining that the Benefits Review Board's contrary interpretation of the definition of "miner" was mandated by the plain language of the BLBA, the Court of Appeals looked solely at the word "transportation" without considering the historical development of the BLBA or Congress' underlying purpose. Moreover, in a totally illogical manner, the court severely limited its analysis of the legislative history of the Black Lung Benefits Reform Act of 1977, refusing to give due weight to the unambiguous expressions of Congressional intent to exclude railroad workers from the Act's coverage.[6]

The BLBA originated as Title IV of the Federal Coal Mine Health and Safety Act of 1969.[7] The stated purpose of Title IV was to provide a temporary benefit program, paid for by the federal government, to compensate coal miners suffering from pneumoconiosis, commonly known as black lung disease, and their surviving dependents. 30 U.S.C. §901(a). Congress found that such temporary federal legislation was needed because of the inadequacy of state workers' compensation programs for coal

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[6] Because the Court of Appeals found that the "plain language" of the Act supported the Benefits Review Board's decision, the court did not base its decision on any deference to the Director's interpretation of "miner". In light of Congress' clearly expressed intent to exclude railroad workers from coverage under the BLBA, the Director's expansive interpretation of Section 402(d) is not entitled to any deference. As this Court explained in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984):

> The judiciary is the final authority on issues of statuory construction and must reject administrative constructions which are contrary to clear congressional intent . . . If a court, employing traditional tools of statutory construction, ascertains that Congress has an intention on the precise question at issue, that intention is the law and must be given effect.

[7] Pub. L. No. 91-173, 83 Stat. 742.

miners.[8] As originally enacted, BLBA only covered persons employed in "an underground coal mine." 83 Stat. 743.

In 1972, Congress amended Title IV to extend this benefits program beyond its original cut-off date and to require mine operators to shoulder the liability for claims after January 1, 1973.[9] Congress once again stated that its purpose in extending the program was to provide benefits because of the continued inadequacy of state workers' compensation laws.[10] Congress also extended the benefit program to miners who worked in strip mines. 86 Stat. 153.

In the Black Lung Benefits Reform Act of 1977, Congress once again amended BLBA, extending the program indefinitely, because of its finding that state workers' compensation programs continued to be inadequate.[11] The term "miner" in BLBA Section 402(d) was also changed to its present language to mean:

> Any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or *transportation in or around a coal mine,* to the extent such individual was exposed to coal dust as a result of such employment.

92 Stat. 95; emphasis added.

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[8] Congress found that "few States provide benefits for death or disability due to this disease to coal miners or their surviving dependents." 30 U.S.C. § 901(a). *See also* H.R. Rep. No. 91-563, 91st Cong., 2d Sess. 14 (1969), *reprinted in* 1969 U.S. Code Cong. & Admin. New 2503, 2516.

[9] Black Lung Benefits Reform Act of 1972, Pub. L. No. 92-303, 86 Stat. 150.

[10] *See* S. Rep. No. 92-743, 92d Cong., 2d Sess. 7, 20 (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. New 2305, 2311, 2324, and H.R. Rep. No. 92-460, 92d Cong., 2d Sess. 12 (1971).

[11] *See* H.R. Rep. No. 95-151, 95th Cong., 2d Sess. 3, 4 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 237, 239-240; S. Rep. No. 95-209, 95th Cong., 1st Sess. 5 (1977), *reprinted in* House Comm. on Education and Labor, 96th Cong., *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977* (Comm. Print 1979) ("Black Lung Legis. Hist.").

At the time of its consideration of the 1977 Amendments, Congress made no findings questioning the adequacy of benefits under existing federal law for employees in the railroad industry affected by black lung disease. No witness testified at the hearings that led to the 1977 legislation that existing federal law did not adequately protect railroad workers suffering from any illness resulting from exposure to coal dust.

Indeed, in implementing this limited benefits program for individuals suffering from black lung disease who were inadequately protected under state law, there would have been no reason for Congress to extend coverage to railroad workers. Congress had already enacted a comprehensive scheme of related federal statutes providing benefits for employees in the railroad industry. Primary protection for disabled railroad employees is provided by the Federal Employers' Liability Act, 45 U.S.C. §§51-60 ("FELA"). For over eighty years, FELA has been the federal remedy to compensate railroad workers suffering from work-related injuries and occupational diseases, including lung diseases.[12] This federal legislation has long been held to supplant state workers' compensation laws.[13] However, because the FELA only protects employees of a "common carrier by railroad" (45 U.S.C. § 51), workers employed by coal mine operators in mine-site rail operations or in the transportation of coal to a preparation plant are not covered by FELA.[14] As is shown below, these are

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[12] *See, e.g., Urie v. Thompson,* 337 U.S. 163, 180-87 (1949) (silicosis of the lungs allegedly resulting from inhalation of dust particles during railroad employment, covered by FELA); *Atchison T. & S.F. Ry. v. Preston,* 257 F.2d 933 (10th Cir. 1958) (pneumonitis and fibrosis of the lungs resulting from inhalation of smoke, fumes, and oil during railroad employment, covered by FELA); Annotation, *Liability Under Federal Employers' Liability Act (45 U.S.C. §§ 51 et seq.) For Industrial or Occupational Disease or Poisoning,* 30 A.L.R. 3d 735 (1970 & Supp. 1989).

[13] *See South Buffalo Ry. v. Ahern,* 344 U.S. 367, 371 (1953); *Boston & Maine R.R. v. Armburg,* 285 U.S. 234, 238-39 (1932); *New York Cent. R. R. v. Windfield,* 244 U.S. 147, 148-54 (1917).

[14] *See McCluskey v. Marysville & N. Ry.,* 243 U.S. 36, 40 (1917), and *Bay v. Merrill & Ring Logging Co.,* 243 U.S. 40, 42-43 (1917) (railroad owned by logging companies that exclusively transported goods of logging companies was not a "common carrier", and therefore employees of railroad were not protected by FELA).

precisely the types of workers the legislative history demonstrates Congress sought to protect in amending the BLBA in 1977.

Two other federal statutes, passed over fifty years ago, provide complementary protection exclusively for railroad workers. The Railroad Retirement Act, 45 U.S.C. §§231-31u, provides an annuity for disabled railroad employees. The Railroad Unemployment Insurance Act, 45 U.S.C. §§351-67, gives qualified railroad employees disability benefits for physical injury and disease. In enacting these statutes, Congress also excluded mine workers from coverage. Both the Railroad Retirement Act and the Railroad Unemployment Insurance Act exclude from coverage any individual engaged in the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple. 45 U.S.C. §§ 231(a)(2)(i), 231(b)(2), 351(d).

In sum, given the longstanding panoply of federal benefit programs for disabled rail workers, it is illogical to conclude that Congress would have intended to include railroad workers under BLBA without even addressing the potential for overlapping coverage, duplicative benefits, or the railroad employees' potential forfeiture of benefits under the Railroad Retirement Act or Railroad Unemployment Compensation Act in also claiming benefits under the BLBA as a "miner." For all these reasons, Congress' rationale for enacting the BLBA as a federal remedy for the deficiencies in state workers' compensation programs is clearly inapplicable to railroad workers.

Moreover, the legislative history of the 1977 Amendments conclusively demonstrates that Congress did not intend to include traditional railroad workers within the definition of "miner" in the BLBA. The House bill, H.R. 4544, made no change in BLBA's definition of "miner".[15] Upon receiving the House bill, the Senate struck out the House language and substituted the text of S.

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[15] H. Conf. Rep. No. 864, 95th Cong., 2d Sess. 15 (1978), *reprinted* in 1978 U.S. Code Cong. & Admin News, 308, 309, *also reprinted* in Black Lung Legis. Hist. 886.

1538.[16] Section 2(b) of S. 1538 proposed to amend BLBA's definition of "miner" as follows:

> The term "miner" means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal. Such term also includes an individual who works or has worked in coal mine construction during any period such individual was exposed to coal dust in his or her employment.[17]

The Senate Report accompanying S. 1538 explained that the purpose of expanding the definition to include "transportation" workers was to bring within the coverage of the Act so-called "outside men" — coal mine employees who truck coal from the mine mouth to the "tipple" , where coal is collected and loaded on a train.[18] The Report expressly stated that the Senate Committee did not intend thereby to include railroad employees:

> *Definition of miner.* — The term is expanded in the Committee bill to include additional workers. Existing law limits the term miner to "any individual who is or was employed in a coal mine." The expanded definition in the committee bill includes . . . those who work or worked in a coal preparation facility or who transport coal, so that "outside men" — workers at the tipple and preparation plant workers, for example, are clearly covered as miners. . . . *The provision does not contemplate inclusion of those workers employed by a railroad, trucking company, or barge line unless such company also operates a mine.* Nor does it include such individuals not directly related to the production of coal such as coke oven workers. These exclusions are not the result of any judgment that such workers

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[16] *Id.*

[17] *See* S. Rep. No. 95-209, 95th Cong., 1st Sess. 34 (1977), *reprinted in* Black Lung Legis. Hist. 637.

[18] *See* S. Rep. No. 95-209, 95th Cong., 1st Sess. 20-21 (1977), *reprinted in* Black Lung Legis. Hist. 623-24.

> should not be compensated for occupational disease — *they are merely beyond the scope of this legislation.*[19]

Senator Jennings Randolph of West Virginia, an ardent advocate of miners' rights and the floor manager of the 1977 black lung legislation,[20] repeated this understanding of the scope of the amended definition during the floor debate on the Senate bill:

> The term "miner" is redefined to include workers who process and transport coal, self-employed miners, coal mine construction workers are also included, but only to the extent that they worked in conditions substantially similar to conditions in underground mines. *Railroad, trucking, bargeline, and coke oven workers are not included in the definition.*[21]

The two bills were sent to a conference committee, which adopted the Senate's amendment to the definition of "miner" in all material respects, as the Joint Explanatory Statement of the Committee of Conference explained:

> *Miner*
>
> The House bill did not modify the existing definition of "miner" . The Senate amendment modified the definition to include all self-employed miners and specified that the term includes workers who are employed in or around a coal mine or preparation facility in the extraction, preparation, or transportation of coal, and construction workers who are exposed to coal dust in their employment.

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[19] *Id.* Emphasis added.

[20] This Court has stressed that the explanatory comments of a bill's floor manager are entitled to substantial weight in the interpretation of a statute's legislative history. *Lewis v. United States,* 445 U.S. 55, 63 (1980); *Simpson v. United States,* 435 U.S. 6, 13 (1978); *Federal Energy Admin. v. Algonquin SNG, Inc.* 426 U.S. 548, 564 (1976); *see also Mills v. United States,* 713 F.2d 1249, 1253 (7th Cir. 1983); *Browder v. Tipton,* 630 F.2d 1149, 1151-52 (6th Cir. 1980).

[21] 123 Cong. Rec. 24,239 (1977), *reprinted in* Black Lung Legis. Hist. 668 (emphasis added).

> *The conference substitute conforms generally to the Senate amendment with an amendment to clarify that transportation and construction workers are covered only to the extent they work in or around a coal mine and are exposed to coal dust.*[22]

Comparison of the Senate's language to that adopted by the Conference Committee and enacted into law reveals that the only differences are that the word "transportation" was shifted from the first to the second sentence of the definition and the phrase "during any period" in the second sentence was changed to "to the extent." The Conference Committee report explained that the relocation of the word "transportation" was solely to "clarify", *i.e.* to narrow, the Senate's language to make clear that "transportation and construction workers are covered only to the extent they work in or around a coal mine and are exposed to coal dust."[23]

The Court of Appeals rejected this definitive legislative history out of hand.[24] It concluded that the plain meaning of the phrase "transportation in or around a coal mine" manifested a clear Congressional intent to include railroad workers within the Act's coverage. App. 5a, 6a. In reaching this conclusion, the court failed to follow this Court's oft-repeated admonition that "[i]n expounding a statute [courts] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (citing cases).[25]

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[22] H. Conf. Rep. No. 864, 95th Cong., 2d Sess. 15 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 308-09; Black Lung Legis. Hist. 886 (emphasis added).

[23] *Id.*

[24] Indeed, the court supported its decision by principally relying on its earlier decision in *Roberts v. Weinberger*, 527 F.2d 600 (4th Cir. 1975), a decision predating the 1977 Amendments, in which the court had found that a truck driver could be a "miner" under the BLBA.

[25] *See also United States v. American Trucking Assoc.*, 310 U.S. 534, 543 (1940) (". . . even when the plain meaning . . . [does] not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal word.").

The phrase "transportation in or around a coal mine" is nowhere defined in the Act. Its "plain meaning" does not compel the inclusion of railroad employees exclusively performing traditional common carrier rail transportation functions. Nor is the inclusion of railroad workers consistent with the limited purpose of the Act: to provide a federal substitute for inadequate state workers' compensation laws. Accordingly, a court must resort to the legislative history to determine Congress' intent.

The Court of Appeals disingenuously dismissed in a footnote the definitive legislative history of the 1977 Amendments discussed above, ruling that the decisive Senate report and the comments of Senator Randolph could be ignored because the "Senate bill . . . did not prevail." App. 7a n.3. In fact, however, the legislative history demonstrates that the Senate bill did "prevail" with respect to the modifications to BLBA's definition of "miner" ; the Senate bill was the sole source for the inclusion of transportation workers within BLBA's coverage. Congress' intent to exclude railroad workers from such coverage cannot have been more clearly expressed. The Court of Appeals' decision interprets Section 402(d) in a way that is totally inconsistent with the express purpose of the legislation and contrary to the relevant legislative history. For this reason, a writ of certiorari should be issued to review the decision.

II. The Federal Courts Have Issued Conflicting Interpretations Of The Coverage Of Railroad Workers Under The BLBA.

This Court also should review the Court of Appeals' decision because the federal courts have issued conflicting decisions interpreting the coverage of the BLBA with respect to railroad workers. Prior to the Court of Appeals' decision herein, a federal District Court had ruled that railroad workers are not included within the definition of "miner" in BLBA Section 402(d).[26]

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[26] The instant Fourth Circuit decision is the first appellate court case to address this issue on the merits.

In 1979 the Department of Labor adopted an internal BLBA guideline interpreting "miner" in light of the 1977 Amendments in a way that would include certain railroad employees.[27]

The railroad industry promptly filed suit challenging this interpretation. In *Louisville & N. R. R. v. Donovan,* No. 80-0611-L(G) (W.D. Ky 1981), the District Court ruled that Congress had not intended to include railroad employment within the Act's coverage and enjoined the Department of Labor from applying the Act to railroad employees:

> It is clear from the legislative history of the 1978 amendment that Congress did not intend the amended definition to include railroad employees. Senate Report No. 95-209 at pages 20-21 states that the amended definition would include so-called "outsidemen," that is, persons working for a coal mining company outside the mine area. However, the Senate Report states that "the provision does not contemplate inclusion of those workers employed by a railroad. . . ." This was confirmed on the Senate Floor by the floor manager, Senator Randolph. 123 Cong. Rec. p. 24239. If Congress had intended the 1978 amendment to include employees from other industries such as railroads, all Congress had to do was say so. It's just that simple. To the contrary; an all-inclusive amendment was introduced to Congress in 1972 to provide Black Lung benefits to any individual employed in any industry who contracted Black Lung. This amendment was not

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[27] The guidelines interpreted "transportation of coal" to include:

> . . . transportation from extraction site to preparation plant or tipple, and any transportation of coal up to the time when the extraction and preparation of the coal has been completed or the time when the extracted coal enters into the stream of commerce. Thus, persons engaged in transportation of coal from a mine site to the ultimate consumer of the coal, or in functions integral to that activity, would not be covered, even if part of their time is spent in or around the mine site. However, those engaged in transport functions between the extraction site and the tipple would be covered where their work is integral or necessary to the preparation or extraction process.

See Louisville & N. R.R. v. Donovan, 713 F.2d 1243, 1244 n.1 (6th Cir. 1983), *cert. denied,* 466 U.S. 936 (1984).

enacted. *Montel v. Weinberger*, 546 F.2d 679 (4th Cir. 1976).

* * *

For all the reasons stated above, the Court holds that the term "miner" in 30 U.S.C. § 902(d) does not include employees of railroads.

App. 13a-14a.[28]

Moreover, the Court of Appeals' decision below, in refusing to credit the 1977 Senate report as the definitive statement of Congress's intent with respect to the occupations included within the expanded definition of "miner", conflicts sharply with the decision of the Eleventh Circuit in *Fox v. Director, OWCP*, 889 F.2d 1037 (11th Cir. 1989).[29] In *Fox*, the Eleventh Circuit considered whether coke oven workers were within BLBA's coverage. In reaching this determination, the court recognized that reliance on the Senate report was critical:

> The legislative history of the Act indicates that while Congress recognized coal dust adversely affects the health of workers in many occupations, coverage of coal preparation activities is contingent on such activities being an integral part of the coal production process. . . . This intent to limit the coverage of the Act is apparent from the following excerpt explaining the expanded definition of the term "miner" under the

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[28] On appeal, the Sixth Circuit reversed the District Court's judgment for lack of subject matter jurisdiction. *Louisville & N. R.R. v. Donovan*, 713 F.2d 1243 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984). The Sixth Circuit concluded that the railroads were required to exhaust the administrative review procedures of the Act before challenging the Department of Labor's interpretation. The Sixth Circuit questioned the District Court's interpretation of the legislative history of the 1977 Amendments. 713 F.2d at 1247-49. However, the Sixth Circuit acknowledged that the issue of the proper interpretation of the amended definition of "miner" was "not properly before us" and, accordingly, that it did not purport to be "making any definitive construction of the BLBA." 713 F.2d at 1248, 1249.

[29] The only other court that has found certain transportation workers to be "miners" within the meaning of the BLBA, as amended in 1977, has also failed to consider this definitive legislative history. *See Stroh v. Director, OWCP*, 810 F.2d 61 (3d Cir. 1987) (self-employed truck driver is a "miner" within the meaning of the BLBA).

> Black Lung Benefits Reform Act of 1977: "The provision does not contemplate inclusion of those workers employed by a railroad, trucking company, or barge line . . . Nor does it include such individuals not directly related to the production of coal such as coke oven workers. These exclusions are not the result of any judgment that such workers should not be compensated for occupational disease - they are merely beyond the scope of this legislation." . . . . Where the legislature has clearly established a boundary, that limit may not be judicially extended.[30]

889 F.2d at 1040-41, *quoting* S. Rep. No. 95-209, 95th Cong., 1st Sess. 21 (1977) (emphasis and footnote omitted).

Accordingly, Petitioner NW submits that a writ of certiorari should issue because the federal courts have issued conflicting interpretations concerning Congress' intent in covering railroad workers under the BLBA.

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[30] Respondent Director of the Office of Workers' Compensation Programs urged the Court of Appeals below to reject N&W's reliance on the 1977 Senate Report because, he argued, the Senate bill had been rejected by Congress. App. 7a, n. 3. However, in *Fox* the Director specifically told the Eleventh Circuit that the definition of "miner" and other terms of the Act "must be read in the context of the meaning intended by Congress. . . . This intent to limit coverage of the Act is clearly seen in the following discussion explaining the expanded definition of the term 'miner' under the Black Lung Benefits Reform Act of 1977," referring to the same excerpt from the 1977 Senate Report relied upon herein by N&W. Brief for Director, OWCP, at 10, *Fox v. Director, OWCP*, 889 F.2d 1037 (11th Cir. 1989).

CONCLUSION

The Court of Appeals' decision interprets the definition of "miner" found in Section 402(d) of the BLBA in a way that is totally inconsistent with the relevant legislative history. This interpretation exposes the rail industry to huge liability and the expense of litigating thousands of claims. The federal courts have reached inconsistent interpretations of this critical term. For these reasons, Petitioner Norfolk and Western Railway Company respectfully submits that its petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: February 8, 1991

APPENDIX

TABLE OF CONTENTS

Page

Opinion of the Court of Appeals in *Norfolk & Western Railway Company v. Olen Roberson and Director, Office of Workers' Compensation Programs, United States Department of Labor*, 918 F.2d 1144 (4th Cir. 1990)..... 1a

Opinion of the United States District Court for the Western District of Kentucky in *Louisville and Nashville Railroad Company v. Donovan*, No. 80-0611-L(G) (W.D. Ky. 1981)..... 11a

Decision of the Benefits Review Board in *Olen R. Roberson v. Norfolk & Western Railway Company, BRB No. 87-235 BLA* 17a

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 89-2192

NORFOLK & WESTERN RAILWAY COMPANY,

Petitioner,

versus

OLEN R. ROBERSON; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents,

ASSOCIATION OF AMERICAN RAILROADS,

Amicus Curiae.

On Petition for Review of an Order of the Benefits Review Board. (87-235-BLA)

Argued: April 4, 1990 Decided: November 16, 1990

Before WIDENER, PHILLIPS, and WILKINSON*, Circuit Judges.

Affirmed by published opinion. Judge Widener wrote the opinion, in which Judge Phillips joined.

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* Judge Wilkinson was a member of the panel which heard oral argument in the case, but he later recused himself. The decision is filed by a quorum of the panel. 23 U.S.C. 46(d).

ARGUED: William Beverly Poff, WOODS, ROGERS & HAZLEGROVE, Roanoke, Virginia, for Petitioner. Elizabeth Hopkins, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C.; Lawrence Lee Moise, III, VINYARD AND MOISE, P.C., Abingdon, Virginia, for Respondents. ON BRIEF: Clinton S. Morse, WOODS, ROGERS & HAZLEGROVE, Roanoke, Virginia; Douglas A. Smoot, JACKSON & KELLY, Charleston, West Virginia, for Petitioner. Robert P. Davis, Solicitor of Labor, Allen H. Feldman, Associate Solicitor for Specital Appellate and Supreme Court Litigation, Steven J. Mandel, Counsel for Appellate Litigation, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C.; Robert Austin Vinyard, VINYARD AND MOISE, P.C. Abingdon, Virginia, for Respondents. J. Thomas Tidd, Daniel Saphire, ASSOCIATION OF AMERICAN RAILROADS, Washington, D.C.; Ralph J. Moore, Jr., John Townsend Rich, Alok Ahuja, SHEA & GARDNER, Washington, D.C., for Amicus Curiae.

WIDENER, Circuit Judge:

Norfolk & Western Railway Company (N & W) petitions for review of a decision and order of the Benefits Review Board affirming an order of an Administrative Law Judge (ALJ) that awarded benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901 *et seq.* (Act), to Olen R. Roberson, a retired N & W employee. Both the ALJ and the Board concluded that N&W qualified as a coal mine operator under the Act and that Roberson qualified as a coal miner who was entitled to benefits. We affirm.

Olen R. Roberson worked as a brakeman and conductor for N & W from 1947 to 1979. The parties do not dispute that the initial and final periods of his employment, from 1947 to 1956 and from 1973 to his retirement in 1979, did not constitute coal mine employment. Between 1956 and 1973, however, Roberson worked on N & W runs that delivered empty railroad cars to mine sites to be loaded with raw coal and which then hauled the raw coal from the mines to a coal preparation plant where the coal was washed, cleaned, graded, and reloaded for further shipment.

One of the principal crews with which Roberson worked made the "Carbo Run," which originated in Carbo, Virginia.[1] This crew traveled from Carbo thirty miles to Richlands, Virginia, where it picked up empty coal cars and delivered them to a Jewel Ridge Coal Company mine located some six miles away. The crew then transported the raw coal back to Carbo to the Clinchfield Coal Company preparation plant, a distance of thirty-six miles. The entire run took twelve to fourteen hours to complete. Roberson's crew also transported raw coal to the Clinchfield preparation plant from mines in Duty, Virginia, an eight to ten mile run that could be accomplished two or three times in one day.

Roberson's duties included coupling and uncoupling high pressure air hoses between the cars, which blew coal dust into the air, setting and releasing brakes, and obtaining loading numbers and tags from the individual cars. Because most of Roberson's tasks were performed while the train was stationary,

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[1] The ALJ credited Roberson with 14 years of coal mine employment based on his testimony that he worked on the Carbo Run a total of 14 years.

Roberson spent a significant portion of his workday at the mine sites and the preparation plant. At times, Roberson "walked" a hundred cars at a time. In addition, coal dust also blew off the tops of the loaded railroad cars during the trips between the mines and the preparation plant. Thus, although Roberson never participated in the actual loading or unloading of coal, he was continually exposed to large amounts of coal dust. Roberson applied for black lung benefits in 1978, one year before his retirement.

The ALJ determined that N & W's coal hauling activities qualified it as the responsible operator under the Act and that Roberson qualified as a miner who was entitled to benefits. Finally, the ALJ concluded pursuant to the interim presumption in 20 C.F.R. § 727,203(a) that Roberson is totally disabled from pneumoconiosis due to coal mine employment, and that N & W failed to rebut the presumption.[2] The Board found that each of the ALJ's conclusions was supported by substantial evidence. See 33 U.S.C. § 921(b)(3).

Our review of the Board's order is governed by section 21 of the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. § 921. 30 U.S.C. § 932(a). Specifically, we must uphold the Board's resolution of questions of statutory construction or application of the Act to a specific set of facts if it is supported by a reasonable factual and legal basis. *Eplion v. Director, OWCP*, 794 F.2d 935, 936 (4th Cir. 1986). In addition, the Director urges us to adopt the Board's interpretation of the Act. Although the Board's interpretation standing alone is not entitled to special judicial deference, if the Director urges us to adopt the Board's interpretation, our analysis is governed by *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 208 (4th Cir. 1990).

Under *Chevron* we first must ask whether Congress directly has addressed the precise issue in dispute. *Chevron*, 467 U.S. at 842. If so, the court and the agency must give effect to unambiguous Congressional intent. *Chevron*, 467 U.S. at 842-

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[2] N & W does not challenge on review the findings of the ALJ and Board on this issue, so the Board's finding of disability stands as ordered.

43. If Congressional intent is unclear or ambiguous, however, we must determine only whether the Director's interpretation is based on a permissible construction of the Act; we may not substitute our own construction of the Act for a reasonable one made by the Director. *Chevron*, 467 U.S. at 844; *Howard*, 904 F.2d at 209.

Our starting point, of course, is the language of the Act, which defines a miner as

> any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction *or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment* .

30 U.S.C. § 902(d) (emphasis added). Thus, the plain language of the statute requires the inclusion in the definition of miner of transportation workers who were involved "in the extraction or preparation of coal," who worked "in or around a coal mine," and who were "exposed to coal dust as a result of such employment." Because N & W does not dispute Roberson's exposure to coal dust, we turn to the other two inquiries, which often are described as the requirements of situs and function. *Eplion*, 794 F.2d at 937.

In affirming an order of the Board denying black lung benefits to a claimant whose job entailed knocking open doors to railroad cars so that coal could be loaded into barges, we emphasized that "[claimant] was not involved in transporting the coal before it was prepared. The coal was already processed and prepared for market before [claimant] had any contact with it." *Eplion*, 794 F.2d at 937. We concluded in *Eplion*, therefore, that the claimant failed to qualify as a miner under the Act because he did not meet the situs and function tests set forth in the statute.

In contrast to *Eplion*, the ALJ's undisputed findings of fact in this case are that Roberson was involved in hauling raw coal from extraction sites (mines) to the preparation plant, which also

is considered a coal mine under the Act. See 30 U.S.C. § 802(h)(2). Transporting raw coal to a preparation plant plainly is part of the preparation of coal, and Roberson therefore satisfies the function test. In addition, the ALJ specifically found that, because Roberson did a lot of his work while the train was parked at the mine sites and the preparation plant, Roberson spent "a significant portion of time" in or around a coal mine, as defined by the statute. Therefore, Roberson also satisfies the situs test.

Except for the mode of transportation involved, and perhaps the distance traveled, this case is indistinguishable from *Roberts v. Weinberger*, 527 F.2d 600 (4th Cir. 1975). In *Roberts* we determined, three years before the 1978 amendment to the statute expressly included transportation workers in the definition of miner, that a truck driver who hauled coal between a strip mine and the tipple qualified as a miner entitled to benefits under the Act. Just as Roberson did in the case at hand, the truck driver in *Roberts* hauled coal from the extraction site to the tipple, where it was processed, graded, and reloaded for further shipment. *Roberts*, 527 F.2d at 601. We reasoned that the driver's functions

> were part of the process of "extracting the coal and preparing the coal so extracted." The coal was not extracted and prepared until it was taken from the mine to the place where it was processed and graded so as to be in condition for delivery to distributors and consumers.

Roberts, 527 F.2d at 602. Because we concluded in *Roberts* that the Act "is unambiguous in extending coverage" to the truck driver, *Roberts*, 527 F.2d at 602, we have little difficulty in concluding that the plain language of the Act, expecially when reinforced by the 1978 amendment, manifests a clear Congressional intent to include in the definition of miner a small group of transportation workers of which Roberson was a member.

N & W advances several arguments in an attempt to distinguish *Roberts* and establish that railroad employees are fundamentally different from other transportation workers. First, it relies extensively on the legislative history to the 1978 amendments to the Act. Because we conclude that the plain language of the Act supports the Board's decision, however, we

"must give effect to the unambiguously expressed intent of Congress," *Chevron*, 467 U.S. at 843, and we have no need to resort to the Act's legislative history.[3]

Second, N & W argues that allowing a railroad employee to recover under the Act would be inconsistent with other federal legislation that already protects railroad employees from disability or injury, such as the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.*, the Railroad Retirement Act, 45 U.S.C. §§ 231 *et seq.*,[4] and the Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351 *et seq.* We disagree. Not only do the statutes

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[3] Even if we found the language of the Act unclear and resorted to the legislative history, our result would be no different. N & W relies on Senate Report No. 209, 95th Cong., 1st Sess. 21 (1977), which states concerning the definition of miner that "[t]he provision does not contemplate inclusion of those workers employed by a railroad, trucking company, or barge line unless such company also operates a mine." The floor manager of the Senate bill, Senator Randolph, made a similar statement during floor debate. The Senate bill, however, did not prevail, and the subsequent Conference Committee Report contains no language excluding railroad workers or any other specific set of transportation workers from the definition of miner; indeed, the Conference Report sticks closely to the literal language of the statute, as have we. H. Conf. Rep. No. 864, 95th Cong., 2d Sess., *reprinted in* 2 U.S. Code Cong. & Admin. News 308-09 (1978). Because the Conference Report "represents the final statement of terms agreed upon by both houses of Congress, next to the statute itself, it is the most persuasive evidence of Congressional intent behind the enactment of a statue." *Davis v. Lukhard*, 788 F.2d 973, 981 (4th Cir.), *cert. denied* 479 U.S. 868 (1986). Thus, even if we looked to the legislative history for guidance, the Director's interpretation of the Act still would be a permissible one that we should not set aside. *Chevron*, 467 U.S. at 843-44. N & W's reliance on *Fox v. Director, OWCP*, 889 F.2d 1037 (11th Cir. 1989), which cited the Senate Report in the course of determining that a coke oven worker was not a miner, is unpersuasive. The *Fox* court did not explain why it resorted to the legislative history of a version of a bill that was not adopted, quite possibly because the passage was not essential to the court's holding. In light of the fact that a coke oven is a consumer of coal, the *Fox* court understandably found that the coke oven worker was not involved in the preparation of coal under the Act. *Fox*, 889 F.2d at 1042-43 ("[T]he processing and use of the minerals by subsequent consumers is not a part of that process.") 889 F.2d at 1040.

[4] N & W has moved to supplement the appellate record in this case to include a letter indicating that Roberson was granted an annuity pursuant to the Railroad Retirement Act based on occupational disability. Although we grant N & W's motion to supplement the record, the letter does not change our analysis for the reasons indicated in the text.

differ in certain material respects (the FELA, for example, requires employer negligence, 45 U.S.C. § 51, while the Black Lung Act does not), none of the other statutes indicate that Congress intended them to preclude the availability of other federal remedial legislation. Instead, the FELA, upon which N & W principally relies, does just the opposite. See 45 U.S.C. § 58 ("Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress."). So that argument is, we think, without merit.

N & W also contends that, as an industry exclusively regulated by the Interstate Commerce Commission (ICC), railroads are uniquely different from other carriers because all their services are considered to be part of interstate commerce. We know of no part of the Act, the regulations, or any reported case interpreting the Act or regulations, however, that distinguishes a common carrier or transportation worker on the basis of connections with interstate commerce. Indeed, in *Roberts* we found that the truck driver qualified as a miner despite conflicting evidence as to whether he was employed by the coal company or a trucking subcontractor. *Roberts,* 527 F.2d at 602. The Fifth Circuit recognized, in *Freeman v. Califano*, 600 F.2d 1057, 1060 & n.2 (5th Cir. 1979), that *Roberts* implicitly rejected an argument that the nature of the employer could make for differing results ("The Fourth Circuit evidently deemed this question unimportant . . ."), and went on to hold that "nothing in [the Act] or the regulations indicates that application of the presumption should turn on the nature or the employer's business rather than the nature and location of the work done." Also, we do not think that the result in *Roberts* would have been different had a state line lain between the mine and the tipple, and we reject N & W's argument.

Within N & W's many references to the ICC and the federal regulatory statutes, however, is a simpler and somewhat more persuasive argument. In the midst of its recitation of statutes and regulations, N & W also argues that the interstate commerce aspects of its business, and the fact that the Carbo Run covered thirty-six miles, take Roberson's employment out of the statutory definition of employment "in or around a coal mine" and "in the extraction or preparation of coal." As we noted earlier,

however, the ALJ found, and N & W does not dispute, that Roberson spent a significant portion of his workday actually at the mines and preparation plant, and that Roberson was engaged in hauling raw coal between two statutory "mines." Thus, N & W's argument, though undoubtedly valid with respect to many of its employees who haul coal, is without merit as to this particular claimant.

Even if Roberson meets the statutory definition of miner, N & W also asserts that it cannot be an operator under the Act. The relevant statute defines operator as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine *or any independent contractor performing services or construction at such mine.*" 30 U.S.C. § 802(d) (emphasis added). In addition, the applicable regulations provide that "any employer of a miner as defined in § 725.202(a) shall, to the extent appropriate, be considered an operator for the purposes of this part. . . ." 20 C.F.R. § 725.491(a). Because we have concluded that Roberson meets the statutory definition of miner, the regulation defines N & W as an operator if "appropriate."

In *Old Dominion Power Co. v. Donovan*, 772 F.2d 92, 96 (4th Cir. 1985), we concluded that Congress intended to include within the definition of operator only those independent contractors who maintain a continuing presence at a mine. Because Old Dominion's employees normally were present at the mine site only once a month to read the meter, we concluded that Old Dominion was not an operator under the statute. By contrast, the ALJ found here that N & W maintained a continuing presence at the mine site and performed services essential to the preparation of the coal. We conclude that N & W appropriately was considered the responsible operator under the Act. [5]

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[5] N & W argues that classifying it as an operator would place the railroad in violation of federal law because railroads are prohibited from transporting commodities that are "manufactured, mined, or produced by the carrier or under its authority." 49 U.S.C. § 10746. However, neither Roberson nor the Director ever has asserted that N & W actually mined or supervised the mining of coal, and considering N & W an operator under the plain language of the Act does not alter what the parties do not dispute. The fact that an employer may be a statutory operator under 30 U.S.C. § 802(d) and 20 C.F.R. § 725.491(a) does not mean that the coal involved was "manufactured, mined or produced" by the employer within the meaning of 49 U.S.C. § 10746.

In conclusion, our holding is necessarily narrow. In the ordinary case a railroad employee engaged in the transportation of coal may well not qualify for benefits under the Act. The demanding tests of function and situs must be met, as they were in this case. After the coal is prepared and reloaded for shipment, a railroad employee would not satisfy the function test. And the possibility of satisfying the situs requirement diminishes as the distance traveled on the rails increases, rendering the employment other than "in or around a coal mine." If a claimant fulfills all the statutory requirements, however, as Roberson has here, we decline to hold that his status as a railroad employee negates his recovery of benefits under the Act to which he otherwise would be entitled.

The order of the Board which has been reviewed is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action
No. 80-0611-L(G)

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.,
Plaintiffs,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.,
Defendants.

MEMORANDUM OPINION

This is an action for declaratory judgment by the Plaintiffs, railroads which transport coal in interstate commerce, against officers and agencies of the United States charged with responsibility for the administration and enforcement of certain provisions of the Federal Mine Health and Safety Act, 30 U.S.C. § 801, *et seq.*, as amended (the "Act"). The question at issue is whether a railroad employee can be a "miner" within the meaning of the Act, and whether a railroad engaged in the transportation of coal can be a "mine operator" who is liable for the payment of Black Lung benefits under the Act. This case presents a justiciable controversy because there are more than 700 pending claims for payment of Black Lung benefits under the Act that have been filed by former and current employees of the Plaintiffs.

This case is before the Court on Plaintiffs' Motion for Summary Judgment, and Defendants' Cross-Motion for Summary Judgment. The parties agree that there is no genuine issue as to any material fact, and this case should be decided as a matter

of law. For the reasons stated herein, the Court holds that Plaintiffs' Motion for Summary Judgment must be granted and Defendants' Motion for Summary Judgment must be denied.

The Court has heretofore denied Defendants' Motion to Dismiss. Defendants argued that the Court has no jurisdiction because the Plaintiffs have not exhausted their administrative remedies. However, this controversy presents purely legal issues involving the construction of a statute, and the pendency of over 700 claims for Black Lung benefits makes these issues fit for judicial decision. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967); *Exxon Corporation* v. *Federal Trade Commission*, 588 F.2d 895 (3rd Cir. 1978). Defendants also based their Motion to Dismiss on the ground the Plaintiffs do not have standing. The Court has heretofore denied such motion because the Plaintiffs have sufficiently alleged that they have been injured by Defendants actions. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978). Because this case does not involve the merits of any particular claim for Black Lung benefits, and the presence of any particular claimant would not contribute toward a resolution of the legal issues presented here, the Court has heretofore denied Defendants' Motion to Dismiss under F.R.C.P. 19 and has also heretofore denied the motion of one Ellis Barker to intervene under F.R.C.P. 24.

Plaintiffs have alleged that they have been injured by Defendants' interpretations of the Act. The Department of Labor adopted an internal guideline in 1979 that included within the definition of "miner" persons performing transportation functions with respect to coal after it left the tipple or coal preparation plant. Circular 79-3, Exhibit A to Complaint. In 1981, the Department of Labor narrowed this internal guideline so that persons performing transportation functions are considered "miners" only as to functions performed between the coal extraction site and the tipple. BLBA Procedure Manual, Appendix A to Defendants' Points and Authorities in Support of Motion to Dismiss. However, the Defendants have admitted that employees of the Plaintiff railroads could be considered

"miners" in certain circumstances under the 1981 internal guideline, and railroads could be liable for payment of Black Lung benefits thereunder. Defendants' Answer to Plaintiffs' Request for Admission, Paragraph 1.

As originally enacted in 1969, the Act defined the term "miner" to mean "any individual who is or was employed in an underground coal mine." This definition was amended in 1972 to delete the word "underground." This definition was again amended in 1978 to include the following persons:

> Any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment. 30 U.S.C. § 902(d).

It is clear from the legislative history of the 1978 amendment that Congress did not intend the amended definition to include railroad employees. Senate Report No. 95-209 at pages 20-21 states that the amended definition would include so-called "outside men," that is, persons working for a coal mining company outside the mine area. However, the Senate Report states that "the provision does not contemplate inclusion of those workers employed by a railroad . . . ." This was confirmed on the Senate Floor by the floor manager, Senator Randolph. 123 Cong. Rec. p. 24239. If Congress had intended the 1978 amendment to include employees from other industries such as railroads, all Congress had to do was say so. It's just that simple. To the contrary; an all-inclusive amendment was introduced in Congress in 1972 to provide Black Lung benefits to any individual employed in any industry who contracted Black Lung. This amendment was not enacted. *Montell* v. *Weinberger*, 546 F.2d 679 (6th Cir. 1976).

An additional factor that must be given weight is that benefits for injured and disabled railroad employees are provided, and were provided prior to passage of the Act, under the Federal Employees Liability Act, 45 U.S.C. § 51, *et seq.*, the

Railroad Retirement Act, 45 U.S.C. § 231, *et seq.*, and the Railroad Unemployment Insurance Act, 45 U.S.C. § 351, *et seq.* In contrast, Congress made a finding when it enacted the Act in 1969 that coal miners did not have a disability benefit program under state workers compensation laws. 30 U.S.C. § 901(a).

For all the reasons stated above, the Court holds that the term "miner" in 30 U.S.C. § 902(d) does not include employees of railroads.

Furthermore, the Plaintiff railroads are not liable for Black Lung benefits unless they are "operators" within 30 U.S.C. § 802(d). The statute that covers liability for benefits, 30 U.S.C. § 932, provides that "operators" are liable for payment of benefits. 30 U.S.C. § 932(b) provides that "each such operator shall be liable for and shall secure the payment of benefits." 30 U.S.C. § 932(c) provides that "benefits shall be paid during such period by each such operator." 30 U.S.C. § 932(h) provides that the Secretary of Labor may provide for apportionment of liability for benefits "among more than one operator." It is true that 30 U.S.C. § 932(b) refers to an "employer other than an operator of a mine" in the context of securing the payment of benefits. However, such reference is apparently meant to distinguish between the two categories of "operators" included within 30 U.S.C. § 802(d). Under 30 U.S.C. § 802(d), an "operator" can be a person [1] who operates, controls or supervises a mine, or [2] who performs services or construction as an independent contractor at a mine. An "employer other than an operator of a mine" is a person who falls within category [2] of "operators" under 30 U.S.C. § 802(d), whereas "an operator of a mine" would be a person who falls within category [1] of "operators" under such statute. See Remarks of Representative Perkins, 124 Cong. Rec. p. H1029. The reference to "an employer other than an operator of a mine" in 30 U.S.C. § 932(b) does not detract from the fact that § 932 contemplates that only "operators" are liable for Black Lung benefits.

An "operator" must, by definition under 30 U.S.C. § 802(d), be involved in work "at" a coal mine, or must control or supervise a coal mine. A "coal mine" includes facilities or other properties used for extracting coal or preparing coal so extracted. 30 U.S.C. § 802(h)(1). A railroad obviously does not extract coal, nor does the work done by a railroad in connection with transporting coal fall within the definition of "work of preparing the coal" set forth in 30 U.S.C. § 802(i). Congress has said that "operators" are liable for benefits, and it is clear that Congress intended this liability to be borne by the coal industry and not any other industry. *National Independent Coal Operators Association* v. *Brennan*, 372 F.Supp. 16 (D. D.C. 1974). For all these reasons, the Court holds that a railroad is not an "operator" within the meaning of 30 U.S.C. § 802(d).

Finally, Plaintiff railroads have contended that it would be unconstitutional to apply the Act to them, because they were not given fair notice that the Act would be applied to them and they were not given an equal opportunity to secure the payment of benefits as was the coal mining industry. The Plaintiff railroads have also contended that application to them of the presumptions contained in 30 U.S.C. § 921(c) would deny them due process of law, because there is no rational basis for the application of those presumptions to railroad employees. These arguments may have merit, but there are sufficient non-constitutional grounds for deciding this case, so the Court should not and does not reach the constitutional questions. *Dawson* v. *Myers*, 622 F.2d 1204 (9th Cir. 1980).

The foregoing shall constitute the Court's findings of fact and conclusions of law. The Court will enter judgment in favor of the Plaintiffs and against the Defendants. Counsel for the

Plaintiffs will tender a judgment in conformity with the foregoing findings and conclusions.

Date 10/5/81

/s/ James F. Gordon
JAMES F. GORDON
SENIOR UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of record.

U.S. Department of Labor

Benefits Review Board
1111 20th St., N.W.
Washington, D C 20036

BRB No. 87-235 BLA
OWCP No. 223-12-5682

OLEN R. ROBERSON
Claimant-Respondent

v.

NORFOLK AD WESTERN RAILWAY COMPANY
Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party-in-Interest

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Lawrence E. Gray, Administrative Law Judge, United States Department of Labor.

Lawrence L. Moise, III (Vinyard & Moise), Abingdon, Virginia, for claimant.

Douglas A. Smoot (Jackson, Kelly, Holt & O'Farrell), Charleston, West Virginia, for employer.

Nicholas J. Levintow (Robert P. Davis, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Jeffrey J. Bernstein, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Larry C. Deener (Landrum, Shouse & Patterson), Lexington, Kentucky and J. Lawson Johnston (Dickie, McCamey & Chilcote, P.C.), Pittsburgh, Pennsylvania, for amicus curiae.

Before: SMITH, Acting Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (83-BLA-7557) of Administrative Law Judge Lawrence E. Gray on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C §901 *et seq.* (the Act). Pursuant to the Board's Order dated February 24, 1989, oral argument was held in Abingdon, Virginia on May 3, 1989.

The administrative law judge found that claimant was a "miner" within the meaning of the Act, and that employer was the appropriate responsible operator. Based upon the filing date of claimant's application for benefits, *i.e,* February 24, 1978, and his crediting claimant with 14 years of qualifying coal mine employment, the administrative law judge considered the claim under 20 C.F.R. Part 727. Director's Exhibit 1. The administrative law judge found that a single qualifying pulmonary function study was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203 (a) (2), and that the evidence of record was insufficient to establish rebuttal of the presumption pursuant to 20 C.F.R. §727.203 (b) (1)-(b) (4). Accordingly, benefits were awarded. On appeal, employer argues that the administrative law judge erred in finding claimant to be a "miner" within the meaning of the Act and in identifying employer, a common carrier by rail, as the appropriate responsible operator. In the alternative, employer contends that the administrative law judge erred in finding the evidence sufficient to establish invocation of the interim presumption under Section 727.203(a)(2) and insufficient to establish rebuttal under Section 727.203 (b) (3) and (b) (4). Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the administrative law judge's Decision and Order. An amicus curiae brief was also filed on behalf of the American Railroad Association (the Association), which contends that railroad employees of interstate common carriers as well as the independent railroad companies are not within the scope of the

Act.[6] In the alternative, the Association contends that the administrative law judge erred by not considering at invocation whether claimant's employment occurred in an environment comparable or substantially similar to that of underground miners.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921 (b) (3), as incorporated by 30 U.S.C. §932 (a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We first address employer's contention that the administrative law judge erred in finding claimant to be a "miner" under the Act, as claimant's duties as a railroad brakeman and conductor fail to satisfy the requisites of qualifying coal mine employment as set forth in *Whisman v. Director, OWCP*, 8 BLR 1-96 (1985).[7] In *Whisman*, a three-prong test was established by

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[6] The Board in its Order dated February 5, 1988 granted the Petition to Intervene on Behalf of the Association of American Railroads and granted the Petition to Intervene on Behalf of the Association of American Railroads and granted the Association's request to participate in this case by filing a brief as "Amicus Curiae." However, as the amicus brief raises virtually all of the same arguments posed by employer, only the unique arguments made on behalf of the Association will be separately addressed.

[7] At issue is the period of claimant's employment with employer which occurred between 1956-1973 when claimant transported raw coal from Carbo Hollows to a Clinchfield Coal preparation facility (hereinafter referred to as the "Carbo Run"). Claimant's duties on the Carbo Run were those of a brakeman and conductor, which the majority of his time spent as a brakeman. Specifically, claimant reported that his work on the Carbo Run consisted primarily of delivering empty coal cars to the mine site (tipple) at Jewell Ridge Coal Co., where the cars were loaded with raw coal by employees of the mine operator which he then delivered to the Clinchfield Preparation Plant, which was located approximately seven to eight miles away from the mine site, where the coal was washed, graded (processed) and classified as to its destination. Moreover, claimant's testimony indicates that his duties entailed delivering the railroad cars at the tipple for loading; coupling and uncoupling the cars; coupling and setting brakes; obtaining tags for the cars; preparing the various paperwork; and, then delivering the raw coal to the "raw coalyard" of the preparation plant at which point other crews would subsequently deliver the processed coal to its destination. *See* Hearing Transcript at 22-26, 30, 48, 50; Director's Exhibit 5.

which to define a miner under the Act and regulations. In order to be a miner under the Act it must be established that, (1) the coal with which the miner worked was still in the course of being processed, and not yet a finished product in the stream of commerce (Status of the coal test); (2) the miner performed a function integral to the extraction of preparation of coal, and not one merely ancillary to the delivery and commercial use of processed coal (function test); and (3) the miner's work occurred in or around a coal mine or coal preparation facility (situs test). *See Whisman, supra; see also Slone v. Director, OWCP,* 12 BLR 1-92 (1988). We note that the United States Court of Appeals for the Fourth Circuit, wherein appellate jurisdiction of this claim lies, has, in defining a miner under the Act, applied a two-prong "function-situs" test which incorporates the status of the coal test and the function inquiry. *See Collins v. Director, OWCP,* 795 F.2d 368, 9 BLR 2-58 (4th Cir. 1986); *Eplion v. Director, OWCP,* 794 F.2d 935, BLR 2-52 (4th Cir. 1986).

Initially, we reject the contention by the amicus curiae suggesting that the test for defining covered coal mine employment also incorporates a requirement that the responsible operator have an economic interest in the coal being mined. Amicus Brief at 10. There is no such requirement in the Act or regulations. *See generally* 20 C.F.R. §§725.492, 725.493.

Employer asserts that with respect to the status of the coal inquiry, the administrative law judge employed an erroneous legal standard by focusing on the condition of the coal itself rather than on its position in commerce. Employer contends that the "status" requirement was not satisfied in the instant case since claimant failed to affirmatively establish that the raw coal being transported had not already been purchased and thus placed in the stream of commerce prior to arriving at the preparation plant. We disagree. The record reflects that claimant hauled raw coal to a preparation facility where the coal was washed, graded, and processed ito its marketable form. *See* Hearing Transcript at 23; Directror's Exhibit 5; *Collins, supra.* The administrative law judge, therefore, reasonably found that claimant, in transporting raw coal which was not yet a finished product in a marketable state, fulfilled the "status" requirement. *See Eplion, supra; Roberts v. Weinberger,* 527 F.2d 600

(4th Cir. 1975); *Shaw v. Director, OWCP,* 7 BLR 1-652 (1985); *Tackett v. Director, OWCP,* 6 BLR 1-1081 (1984). In addition, we reject employer's argument that the coal had entered the stream of commerce by virtue of its being a consigned shipment as the record is devoid of any evidence which would substantiate this assertion.

With respect to the "function" requirement, employer contends that claimant's duties were integral only to the transportation process and not to the coal extraction or preparation since claimant was continuously employed by a railroad company, not by a coal mine operator or company. Employer suggests that the fact that claimant hauled raw coal in this case was only incidental to his transportation-related duties. The administrative law judge, as finder of fact, acted within his discretion in determining that claimant's transportation of raw coal from the mine to the preparation plant was integral to the coal production process. *See generally Stroh v. Director, OWCP,* 810 F.2d 61, 9 BLR 2-212 (3d Cir. 1987); *Seltzer v. Director, OWCP,* 7 BLR 1-912 (1985); *see also Whisman, supra.* Moreover, we reject the argument that the nature of an employer's business is determinative on the issue of whether claimant is a miner under the Act. *See generally Freeman v. Director, OWCP,* 600 F.2d 1057 (5th Cir. 1979); *Roberts, supra; Clifford v. Director, OWCP,* 7 BLR 1-817 (1985). We, therefore, affirm the administrative law judge's finding that claimant's transportation of coal was integral to the coal production process.

Employer further argues that claimant did not satisfy the "situs" prong since claimant's employment primarily involved transporting coal *away* from the mine site. Moreover, employer maintains that claimant failed to carry his burden of proof in establishing that the time he spent at the mine site was significant so as to fulfill the "situs" requirement. The administrative law judge properly found that claimant worked "in or around a mine" since the boundaries of a mine extend at least to the point where the coal is processed and loaded for further shipment. *See* 20 C.F.R. §725.101 (a) (23); *Roberts, supra.* The administrative law judge further acted within his discretion in finding, based upon claimant's uncontradicted testimony, that claimant had established that a significant portion of his work day occurred at the

mine site. *see* Hearing Transcript at 28-29, 38-40, 59-61, 62; *Clifford, supra.* The administrative law judge's finding that claimant has satisfied the situs test is affirmed, and we, therefore also affirm his finding that claimant's work constituted that of a miner as defined by the Act. *See* 30 U.S.C. §902 (d); 20 C.F.R. §725.101 (a) (26).

We next address employer's contention that policy-based considerations require the reversal of the administrative law judge's finding that claimant is a "miner" under the Act. Employer first contends that Congress did not intend to include railroad employees in its definition of a "miner" as there is no provision which expressly includes railroad employees within the scope of the Act's coverage. Employer maintains that the legislative history of the Act demonstrates that the definition of a "miner" was amended only to cover self-employed coal miners who perform coal mine employment typically performed by coal mine operators and that Congress did not intend to extend coverage to the railroad industry. We are not persuaded by employer's contentions. The Act and implementing regulations do not specifically exclude the railroad industry from their coverage, and based on the arguments raised before us, we are not convinced that any such exclusion was intended. Consequently, we decline to hold that railroad employees are excluded from coverage under the Act.[8] We further note that the Board and at least one circuit court of appeals have held that railroad employees may indeed be covered under the Act. *See Louisville and Nashville R. Co. v. Donovan,* 713 F.2d 1243, 1247-1248 (6th Cir. 1983); *Seltzer, supra; Clifford, supra.*

Next, employer contends that railroad employees were not intended to be a protected group under the Act in view of the fact that other federal laws exist for railroad employees which provide a myriad of disability benefits, including benefits for occupational disease such as silicosis, that distinguish

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[8] Compare the instant Act to the Occupational Safety and Health Act, 29 U.S.C. §653 (1970) which contains a provision excluding certain employees who are covered under the jurisdiction of other federal agencies.

between railroad employment involved in the mining, preparation or supplying of coal and those not so involved.[9] We are again unpersuaded by employer's contention. The mere existence of other federal remedial statutes which pertain specifically to disabled railroad employees is not conclusive with respect to the inquiry of whether such railroad employees may also be considered miners under the Act. Moreover, as the Director notes, the Act does not limit or condition its applicability on the basis of other existing parallel statutes. *See generally Yost v. Schweikerk,* 699 F.2d 438 (8th Cir. 1983).

We also reject the argument raised by the Association suggesting that the interim presumption is not available to railroad employees unless such employees work in an environment comparable or substantially similar to that of underground miners. Again, no such limitation is expressed in the Act or regulations.

We next turn to employer's contention that the administrative law judge erred in identifying it as the appropriate responsible operator in this case. Employer contends that it is not an "operator" as defined by the Act since it does not operate, control, or supervise a coal mine (and has not done so since 1955), and since it is not an independent contractor performing such services at a mine.[10] Employer further asserts that it is not an independent

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[9] Specifically, employer refers to the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.* (FELA), the Railroad Retirement Act of 1974, 45 U.S.C §231, *et seq.*, and the Railroad Unemployment Insurance Act, 45 U.S.C. §351, *et seq.*

[10] 20 C.F.R. §725.491 provides in pertinent part that an operator may be:

> . . . any owner, lessee or other person who operates, controls, or supervises a coal mine or any independent contractor performing services . . . at such mine . . . other employers, including those engaged in . . . *transportation,* shall also be considered to be operators for purposes of this part . . . an independent contractor which performs . . . services . . . at a mine or preparation . . . facility may be held liable for the payment of benefits under this part as a coal mine operator with respect to its employes who work . . . in or around a coal mine . . . [in the] *transportation* of coal . . . with such contractor . . . It is Congress' intent that *any employer of a miner as defined in §725.202(a) shall, to the extent appropriate, be considered an operator for the purposes of this part* . . . (Emphasis added).

contractor since its work in transporting coal does not include extracting or preparing coal, *i.e.,* tasks which are usually performed by an operator of a coal mine. Employer also contends, in the alternative, that even if it is deemed to be an operator under the Act, the administrative law judge erred in not finding that its presence at the mine site providing transportation services constituted inadequate and *de minimus* contact.

Contrary to employer's assertions, the administrative law judge acted within his discretion in identifying employer as an operator under the regulations which provide, without excepting independent railroad companies, that ". . . any employer of a miner as defined in §725.202 (a) shall, to the extent appropriate, be considered an operator for purposes of this part and the provisions of this part shall be construed in accordance with this intent." 20 C.F.R. §725.491 (a). Also, the administrative law judge reasonably found that employer maintained a continued presence at the mine as opposed to *de minimus* or sporadic contact, especially in light of the fact that claimant's Carbo Run employment occurred over a span of 17 years. Thus, we affirm the administrative law judge's finding that employer is an "operator" for purposes of the Act on the basis that employer "employed" a "miner" as defined by the Act and maintained a continuing presence at the mine site. *See* 20 C.F.R. §725.491; *Itell v. Ritchey Trucking Company,* 8 BLR 1-356 (1985).[11]

Employer also maintains that common carriers by rail are not appropriate responsible operators under the Act. Employer asserts that common carriers by rail are not covered under the Act as they are not specifically included in the Act, thereby evidencing Congress' intent not to extend coverage to independent railroad companies. Employer also avers that since only the coal mining industry contributes to the Black Lung Disability Trust Fund, Congress therefore intended to place the burden of payment solely on the coal mining industry. Again, we are not persuaded by employer's arguments. The Act's implementing

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[11] Employer also contends that if it is deemed to employ a miner engaged in coal mine employment, then it will simultaneously be in *per se* violation of federal laws which prohibit railroad companies from transporting commodities in which they have a part in the production. This argument, however, is not determinative on the issue of whether the Act or its implementing regulations intended to exclude such workers.

regulations do not exclude independent railroad companies from their coverage. *See* 20 C.F.R. §725.491. It is the Board's position, therefore, that had Congress intended to provide an exception for independent railroad companies, it would have done so.

Finally, we address employer's contentions pertaining to the administrative law judge's findings at Part 727. Employer challenges the administrative law judge's finding that the evidence was sufficient to establish invocation of the interim presumption pursuant to Section 727.203 (a) (2) on the basis of a single qualifying pulmonary function study and insufficient to establish rebuttal pursuant to Section 727.203 (b) (3) and (b) (4).[12]

Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Supreme Court held that all like-kind evidence must be weighed prior to invocation and that invocation must be established by a preponderance of the evidence. *Mullins Coal Co., Inc. of Virginia v. Director, OWCP,* 108 S.Ct. 427, 11 BLR 2-1 (1987), *reh'g denied,* 108 S.Ct. 787 (1988). Although the administrative law judge based his finding of invocation on a single qualifying pulmonary function study, it is noted that all of the conforming pulmonary function study evidence of record yielded qualifying values under Section 727.203 (a) (2). *See* 20 C.F.R. §§410.430, 727.203 (a) (2); *see also Anderson v. The Youghiogheny and Ohio Coal Co.,* 7 BLR 1-152 (1984). We therefore hold that invocation at Section 727.203 (a) (2) is established as a matter of law.[13]

Turning to rebuttal, employer first contends that the administrative law judge erred in discrediting the medical opinions of Drs. Buddington and Byers simply because their opinions were primarily based on negative x-ray evidence. An administrative law judge may not discredit medical reports on the basis that they were based, in part, on negative x-ray evidence

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[12] A "qualifying" pulmonary function study yields values that are equal to or less than the appropriate value set forth in the table at Section 727.203 (a) (2).

[13] The administrative law judge's findings that the evidence failed to establish rebuttal at Section 727.203 (b) (1) and (b) (2) are affirmed as they are not challenged on appeal. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

when the record contains subsequent positive x-ray evidence. *See generally Casey v. Director, OWCP,* 7 BLR 1-873 (1985). The administrative law judge, however, acted within his discretion in giving the medical opinions of Drs. Buddington and Byers less weight on the basis that the later x-ray evidence suggested that claimant's condition had subsequently changed, thereby rendering those opinions less probative.[14] *See Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989). Employer also maintains that the medical opinion of Dr. Smiddy is not a reasoned opinion since the physician failed to provide an adequate rationale for his conclusions and failed to address the issue of etiology. The administrative law judge rationally credited the medical opinion of Dr. Smiddy over the other medical opinions of record since Dr. Smiddy's opinion was the most recent opinion of record based on the most recent objective evidence. *See Bates v. Director, OWCP,* 7 BLR 1-13 (1984). We therefore affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish rebuttal at Section 727.203 (b) (3).[15]

Employer's other contentions, *i.e.,* that the administrative law judge rejected without explanation the x-ray reading of Dr. Kress and improperly weighed the x-ray evidence at Section 727.203 (b)(4), are likewise without merit. The administrative law judge considered all of the x-ray evidence of record in conjunction with the medical opinion evidence at Section 727.203 (b)(4) and rationally found the x-rays of August 24, 1984 and July 2, 1985 to be the most probative radiographic evidence of record based on their recency. *See Clark, supra.* In finding the August 1984

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[14] It is noted that the medical opinion of Dr. Buddington is insufficient to establish rebuttal at Section 727.203 (b)(3) since it fails to address the cause of claimant's impairment and does not rule out the causal relationship between the miner's disability and his coal mine employment. *See Phillips v. Jewell Ridge Coal Co.,* 825 F.2d 408 (table), 10 BLR 2-160 (4th Cir. 1987); *Bethlehem Mines Corp. v. Massey,* 737 F.2d 120, 7 BLR 2-72 (4th Cir. 1984).

[15] Contrary to employer's contention, Dr. Smiddy did address the cause of claimant's respiratory disability. The physician opined that claimant has a severe respiratory impairment with total disability related to a combination of severe chronic obstructive pulmonary disease and an element of significant coal dust exposure. *See* Claimant's Exhibit 8. Moreover, it is not claimant's burden on rebuttal to establish the degree to which claimant's coal dust exposure contributed to his respiratory disability. *See Lattimer v. Peabody Coal Co.,* 8 BLR 1-509 (1986).

x-ray to be positive for pneumoconiosis, the administrative law judge reasonably gave greater weight to the positive interpretations of that x-ray based on the numerical superiority of the positive readings by physicians with superior qualifications. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); *see also Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). In subsequently weighing the positive readings of the August 1984 x-ray with Dr. Westerfield's negative readings of the July 1985 x-ray, the administrative law judge acted within his discretion in giving greater weight to the positive readings on the basis that they were read by physicians with qualifications superior to those of Dr. Westerfield. *See Roberts, supra.* In addition, employer argues that the administrative law judge erred in applying the "true doubt" rule on rebuttal at Section 727.203 (b)(4). Although the administrative law judge applied the "true doubt" rule in weighing the readings pertaining to the August 1984 x-ray, no prejudice resulted to employer as the administrative law judge, in finding that employer failed to establish rebuttal of the interim presumption by a preponderance of the evidence, applied the correct burden of proof. *See Meade v. The Pittston Co.*, 6 BLR 1-224 (1983). Thus, substantial evidence supports the administrative law judge's finding that the medical and x-ray opinion evidence failed to establish rebuttal at Section 727.203 (b)(4), and that finding is therefore affirmed. Finally, employer asserts that the administrative law judge erred in failing to explain his rejection of the x-ray report of Dr. Kress which was submitted at the hearing. Contrary to employer's contention, the record reflects that employer voluntarily withdrew Dr. Kress' x-ray reading and accompanying qualifications during the hearing and did not subsequently submit that evidence into the record. *See* Hearing Transcript at 15-16; Employer's letter dated September 10, 1986.

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

/s/ ROY P. SMITH

ROY P. SMITH, Acting Chief
Administrative Appeals Judge

/s/ JAMES F. BROWN

JAMES F. BROWN
Administrative Appeals Judge

/s/ NANCY S. DOLDER

NANCY S. DOLDER
Administrative Appeals Judge

Dated this 29th
day of September 1989